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Nos. 80-1640, 80-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION,
THE UNITED STATES OF AMERICA,
METROPOLITAN EDISON COMPANY,
JERSEY CENTRAL POWER & LIGHT COMPANY
AND
PENNSYLVANIA ELECTRIC COMPANY,
Petitioners

v.

PEOPLE AGAINST NUCLEAR ENERGY,
STEVEN SHOLLY AND DONALD E. HOSSLER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether § 189 of the Atomic Energy Act authorizes the NRC to deny to affected persons a duly requested hearing before giving effect to a license amendment which irreversibly impacts health and the environment but is summarily found by the NRC to involve "no significant hazards consideration."

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UNITED STATES NUCLEAR REGULATORY COMMISSION, *Et Al.*,

Petitioners

v.

PEOPLE AGAINST NUCLEAR ENERGY, *Et. Al.*,

Respondents.

ON WRIT OF CERTIORARI TO
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THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

People Against Nuclear Energy, Steven Sholly and Donald E. Hossler, respondents in 80-1640 and 80-1656 submit this brief on the merits in these consolidated cases.

OPINION BELOW

The decision of the Court of Appeals is reported at 651 F.2d 780. The denial of rehearing *en banc* and dissent therefrom appear at id. 792.[1]

STATUTE INVOLVED

THE ATOMIC ENERGY ACT, SECTION 189(a) ("§ 189"), provides in pertinent part as follows:

Sentence One; In any proceeding under this Act, for the . . . amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any person as a party to such proceeding . . .

Sentence Two; The commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application . . . for a construction permit . . .

Sentence Three; . . . [T]he Commission may, in the absence of a request therefor by any person whose interest may be affected, issue . . . an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so.

Sentence Four; The commission may dispense with such thirty days' notice and publication with respect to any ap-

[1] The officially reported opinion differs in several material respects from that printed in the Petition for a Writ of Certiorari of the government ("Pet.") and in that of Metropolitan Edison *et al.* ("Met Ed").

plication for . . . an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration. (Sentence enumeration added)

STATEMENT OF THE CASE

On March 28, 1979 the now-famous Three Mile Island nuclear power reactor accident began. Due to a partial meltdown of the reactor core of Three Mile Island Unit 2 ("TMI-2"), radioactive gas and radioactive particulate matter was released into the atmosphere. This release of radiation caused, among other things the evacuation of some of the local residents.

In addition to this release of radiation to the atmosphere, radioactive gases such as Krypton gas (Kr-85) accumulated in the crippled reactor's containment building, along with radioactive particulate matter such as Strontium-90, Plutonium-239 and Carbon-14. See NRC Staff Report, "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere", May, 1980, Record, Vol. V, Tab 69, p.3-1, line 6, ("NRC Final Assessment"); Institute for Energy and Environmental Research, Heidelberg, FRG, "Radiation Exposure Due to Venting TMI-2 Reactor Building Atmosphere", June 12, 1980, (Attachment B, Petition for Review of Final NRC Orders, No. 80-1691) p.4, ("Heidelberg Report"); *cf* J.A. 61.

These radionuclides were eventually ordered by the NRC to be released into the atmosphere, in two Orders from which these consolidated lawsuits arose. Respondents Sholly and Hossler petitioned for review of the NRC orders stating that law and regulation required *30*

days prior notice before these NRC orders could be made effective, since they both effected amendments to Metropolitan Edison's operating license, and since they both involved "significant hazards consideration". And in a second petition, People Against Nuclear Energy (PANE) stated that *hearings* on both NRC Orders were required under § 189 since both Orders effected license amendments and since a hearing had been requested by persons "whose interest may be affected by" the amendments.

The NRC opposed any notice or hearing on either of the two Orders. The NRC contended that the Order entitled "Memorandum and Order" was not subject to the § 189 notice and hearing requirements because it was not a license amendment. The NRC then claimed that both notice and a duly requested prior hearing could be waived on the "Order for Temporary Modification of License" ("Modification of License") because a summary finding of "no significant hazards consideration" had been made by the NRC. Pet. 49a, 62a.

The United States Court of Appeals for the District of Columbia rejected this reasoning. It found that a hearing had been duly requested and was required by law to be granted on both orders. Therefore, the Court of Appeals found it unnecessary to reach the question of whether 30 days' notice was required prior to effectuating the NRC orders. 651 F.2d 786, note 16. Therefore the Court of Appeals did not need to resolve the question of whether the NRC orders did involve "significant hazards consideration." The Court of Appeals held that the "Memorandum and Order" did effect a license amendment and accordingly a hearing should have been held on the matter of releasing radiation into the environment. The Court of Appeals also held that the hearing should have included the matter contained in the "Modification of License" since the Court

found nothing in the legislative history of § 189 to suggest that the plain language of the provision should be modified as to permit a waiver of hearing upon an NRC finding of "no significant hazards consideration." Moreover the Court found that the "administrative practice" offered by the NRC to support its interpretation of the statute was not unambiguous and in any event could not "avail to overcome a statute so plain in its commands as to leave nothing for construction." 651 F.2d 789, note 26, quoting *Norwegian Nitrogen Products Co.* v. *U.S.*, 288 U.S. 294, 315 & 1933). The Court of Appeals entered a declaratory judgment on both of these two holdings.

The Petitioners sought certiorari in this Court only on the second, and lesser, of the holdings, i.e. that § 189 does not authorize the NRC to deny a requested hearing on the basis of a "no significant hazards consideration" finding.

The NRC Orders from which these consolidated cases arose followed a series of NRC actions. The first of these appeared about four months after the beginning of the Three Mile Island crises, when the NRC issued on July 20, 1979 an "Order for Modification of License", 44 Fed. Reg. 45271, which said the NRC was reviewing the TMI-2 operating license to see what license modifications were needed to "assure the continued maintenance of the current safe, stable, long-term cooling condition of the facility." It stated that "[t]his evaluation will be set out in a forthcoming Safety Evaluation which will address the imposition of new and/or revised Technical Specifications. It is expected that this effort will be completed in about 30 days at which time a further Order will be issued."

Pending a second Order the NRC suspended the "authority granted by the TMI-2 Operating License No. DPR-73 to operate Three Mile Island Nuclear Station,

Unit 2", but provided that the "licensee shall maintain the facility in a shutdown condition." Further, the NRC found that the "public health, safety and interest require that this suspension be effective immediately" and promised that the subsequent Order would state the time for requesting a public hearing "on this matter." Id.

A second Order imposing new or revised Technical Specifications and other license modifications was not forthcoming within the promised 30 days. Instead, on November 21, 1979, the NRC issued a "Statement of Policy and Notice of Intent to Prepare a Programmatic Environmental Impact Statement," 44 Fed. Reg. 67738. This Statement announced the decision of the NRC to prepare a "programmatic environmental impact statement on the decontamination and disposal of radioactive wastes resulting from the March 28, 1979 accident" at TMI-2. J.A. 36 The Statement goes on to say that if the NRC decides it to be in the public interest to purge the containment building of radioactive gases before the "programmatic" EIS [Environmental Impact Statement] is complete "the Commission will consider CEQ [The Council on Environmental Quality]'s advice as to the Commission's NEPA [National Environmental Policy Act] responsibilities." CEQ's advice was that venting the radioactive gas prior to preparation of an Environmental Impact Statement would be inconsistant with NEPA. J.A. 83. The Statement concludes that with "the help of the public's comments on our proposals we intend to assure, pursuant to NEPA and the Atomic Energy Act, that the cleanup of TMI-2 is done consistently with the public health and safety, and with awareness of the choices ahead."

On February 11, 1980 the NRC issued its second "Order," 45 Fed. Reg. 11282, February 20, 1980. J.A. 39-45. This Order recognizes that

> in the present post accident status of the facility, the license itself does not include explicit provisions or technical specifications for assuring the continued maintenance of the plant in a safe, stable condition . . . [P]rovisions [concerning operation] are now simply inapplicable to the facility in its present post-accident condition. J.A. 40

Therefore, the Order modified the operating license to, among other things, "prohibit venting or purging or other treatment of the reactor building atmosphere" or other waste disposal until "approved by the NRC" in accordance with the November 21, 1979 Statement (44 Fed. Reg. 67738).

The second Order also proposed new "Appendix A" Technical Specifications as a formal amendment of the license which was not to take effect until after holding any requested hearing. (This Order did not change the license's Appendix B "Environmental Technical Specifications" which set maximum limits on effluent releases and discharges.) But paradoxically, the Appendix A changes were also made immediately effective by amendment of the July 20, 1979 Order for Modification of License, and the NRC stated that the operation of this amendment would not be stayed by a request for a hearing. The subject matter of any requested hearing was limited to: (a) the new Appendix A technical specifications; and (b) "whether the provisions of this Order would significantly affect the quality of the environment."

In response to this February 11, 1980 Order, hearings were requested by the Environmental Coalition on Nuclear Power, and by two individuals. See "Nuclear Accident and Recovery at Three Mile Island," S. Report, Subcommittee on Nuclear Regulation, June, 1980, Ser.

No. 96-14, 98th Cong. 2nd Sess. p. 208. One of these individuals was Respondent Steven Sholly. Hearings on this Order had still not been held by the time the venting occurred, on June 28, 1980.

On March 27, 1980, the NRC published a notice in the Federal Register on the "Availability of Environmental Assessment for Decontamination of Three Mile Island Unit 2 Reactor Building Atmosphere," 45 Fed. Reg. 20265. This notice announced that a draft of an NRC staff report "recommends that the building atmosphere be decontaminated by purging to the environment" and that it concludes, based "on its estimate of doses to the public," that "this action does not constitute a significant environmental impact." This notice did not provide for any public hearings, although it did allow written comments if they were submitted by April 11, 1980 (i.e. within two weeks of the publication date of the notice). A later "Addendum 2" to this draft report was made available on April 2, 1980, 45 Fed. Reg. 21760, and again, written comments were allowed if they were submitted within two weeks, by April 17, 1980. Numerous people, including the Governor of Pennsylvania, Richard Thornburgh, criticised these short periods for public comment, since the NRC had taken an entire year in preparing its report, and since there had not been any general publicity about the staff report. As a consequence, the NRC published a notice entitled "Extension of Comment Periods," 45 Fed. Reg. 30760, May 9, 1980, which extended the comment period by one week from the publication of that notice, until May 16, 1980. See S.Rep., "Nuclear Accident," supra at 206.

After this, the NRC staff issued its report, "Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere," NUREG-0662, May 1980 (Record, Vol. V, Tab 69). This

Final Assessment discussed several alternative methods for decontaminating the TMI-2 reactor building atmosphere. These methods included cryogenic processing (i.e. freezing) of the gas, gas compression, a fluorocarbon absorption process developed at Oak Ridge National Laboratory, and other processes which would remove the radioactive contaminants from the reactor containment building atmosphere for ultimate storage and isolation from the environment. Each of these methods presented alternatives which would meet in varying degrees the objective of maintaining "radiation exposures, and releases of radioactive materials in effluents to unrestricted areas, as low as is reasonably achievable", 10 CFR Section 20.1(c). The NRC staff also presented another alternative: to turn on the TMI-2 ventilation system so as to simply release the Krypton gas into the ambient air, along with all of the radioactive particulates that would pass through the system's filters with the gas. These radioactive materials would then be disseminated throughout the air and deposited on the land, including valuable farm property, near the plant, where they would remain as sources of radiation for periods determined by the half-lives of each radionuclide. The half-life of Kr-85 is over 10 years, that of Pu-239, for example, over 24,000 years. The venting, or "purge", alternative was clearly the cheapest of all the alternatives. It was this alternative that the NRC staff recommended for adoption by the Nuclear Regulatory Commission on the grounds that it was the one which could be executed most quickly.

No public hearings were ever held on the NRC staff recommendation, though written coments from the public and some interested parties were received. Some of these were included in Volume 2 of the NRC staff report. NUREG-0662. The Comments from the public over-

whelmingly opposed the purge alternative, as did an enraged public at a "meeting" held by the NRC on March 19, 1980. Record, Vol. IV, Tab 46, p. 16 and *passim;* J.A. 85.

On June 5, 1980, the five NRC Commissioners met to consider the staff report. Although the public could attend this meeting, there was no opportunity for any of the people who would be affected by the NRC staff recommenddation, or any other members of the public, to be heard. At this meeting a summary of a report prepared by the Institute for Energy and Environmental Research, of Heidelberg, FRG, was presented to Commissioner John F. Ahearne, Chairman of the Nuclear Regulatory Commission. This summary stated the conclusions of the Institute's final report, published on June 12, 1980, that the proposed venting could cause four additional cancer cases and an equivalent level of genetic damage. Heidelberg Report, pp. 6 and 13.

On June 12, 1980, the NRC issued the two final orders which gave rise to these consolidated lawsuits, authorizing the venting of radioactive materials into the environment as recommended by the NRC staff. The "Modification of License" provided that the "Environmental Technical Specifications," (Appendix B of the TMI-2 Operating License DPR-73, dated February 8, 1978) would be amended to suspend the detailed limitations on releases of radioactive materials contained in Section 2.1.2. Appendix B of the license titled "Gaseous Effluents". This affected portion of the license is intended to implement the "design objectives" set out in 10 CFR Part 50, App. I, § II (B & C) and 10 CFR Section 50.36a for operating reactors, which permit flexibility by allowing quarterly averaging of high releases into the environment so as to assure that "unusual operating conditions that temporarily result in releases

higher" than those normally allowed do not interfere with "a dependable source of power." 10 CFR Part 50, App I, § IV. The releases thus authorized by the NRC for the TMI-2 cleanup therefore exceeded even the amounts allowed for an *operating* reactor, even after allowing for unusual operating conditions. See Pet 64a note.

The "Modification of License" was made "effective immediately" (Pet 65a), and the venting of radioactive materials was authorized starting 10 days after June 12 (Pet. 58a). The "Modification of License" specifically stated that a request for a hearing would not stay its effectiveness (Pet. 66a) and officially stated its summary conclusion that the change in Appendix B of the Operating License "involves no significant hazards consideration" (Pet. 64a, 65a).

The reason given for the finding of "no significant hazards consideration" was not, however, a scientific or technical one, but rather a legal argument. The NRC did not contend that the releases would not exceed the approximately 1300 curies of Kr-85 monthly that the reactor would normally release while in operation, nor did the NRC contend that the releases would not exceed the approximately 100 curies of Kr-85 monthly that the reactor was releasing to the environment at that time. J.A.31. Nor did the NRC argue that the offsite doses of radiation to people in the Three Mile Island area would not increase with the purging – as indeed they did increase.

Instead, the NRC simply contended that these increased doses of radiation to the public would still fall "within the *limits that would apply if the reactor were operating normally*" (Pet. 64a, emphasis added). The NRC then concluded that since the doses resulting from venting would not exceed the *standards* for radiation *doses* applicable to an *operating* reactor and therefore would implement "the

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The "Modification of License" was intended to provide the NRC maximum flexibility in administering the venting operation so as to allow releases of even greater amounts of radiation to the environment than those already substantial amounts nominally allowed by the operating license. Since this required an explicit license amendment it was isolated in a separate order. Petitioners have mischaracterized the "Modification of License" as "replacing" limits on releases of radiation with "new limits expressed in terms of actual radiation dosages." U.S. Brief, pp. 3 & 6. However the limits on dosages were neither "new" nor did they relate to "actual" doses received by the people around Three Mile Island. The dosage limits provided by the Modification of License, Pet. 65a, – 15 mrem skin dose and 5 mrem total body dose – are the same as the limits provided by 10 CFR Part 50, App. I, § II.B(2)(b) for annual offsite doses that will be "deemed" to comply with the ALARA requirement for operating light water reactors. The additional provision that 20% of these limits should not be exceeded in any one hour period compares with the reporting requirement contained in id., § IV. A that attaches if half of these limits is exceeded in any one *quarter.* It is readily apparent that the dosage limits provided in the Modification of License are very little different than those already applicable to TMI-2 under Appendix I of Part 50. Accordingly the NRC did not "replace" the suspended release limits with "new" dosage limits, but rather left the old dose standards roughly the same, thereby leaving only half of the former protection against radiation in place. Similarly, the dose standards were not based on actual measurements of doses to real individuals but rather were based on hypothetical doses calculated from a limited number of sampling stations.

An independent team of scientists performed their own radiation sampling and measurements during the full course of the venting operation. These scientists tracked the "plume" of materials released from TMI-2 and placed their instruments at the point where the radioactive effluent reached ground level. J.A. 98-99. On the basis of their independent measurements these scientists calculated that 7 millicuries of Strontium-90 had been released — four million times the amount expected by the NRC. J.A. 102,104. These independent scientists calculated that this amount of Strontium-90 was sufficient to cause long term health effects of 50 to 300 additional fatal cancers as well as other genetic effects. J.A. 104. The people who will die from these cancers and who will suffer from genetic defects will have no recourse against petitioners for the damages done them solely for purposes of cutting the expense of the cleanup. The trail of causation from these injuries back to petitioners' action in June and July 1980 becomes lost in the myriad alternative causes of cancer and genetic defects. The hearing which the Court of Appeals below held to have been illegally denied was the only recourse available to the people exposed to these dangers.

The question of whether the hearing on the release of radiation from TMI-2 to the environment was illegally denied by the NRC is not before this Court. That question has not been appealed and therefore must be taken as settled. It was unlawful for the NRC to deny a public hearing on the decision to release radioactive materials from TMI-2. The narrow question before this Court is whether it was also unlawful for the NRC to refuse to include as part of such a hearing the matters addressed in the Modification of License, i.e. the suspension of the limits on release of radiation contained in the operating license.

SUMMARY OF ARGUMENT

Sentence One of § 189, which has been in effect since 1954, provides as follows:

> In any proceeding under this Act, for the . . . amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding . . .

A 1962 amendment to § 189 made the following changes with respect to hearings on licensing actions under the Atomic Energy Act:

> Sentence Two – retained a mandatory hearing requirement for construction permits while eliminating mandatory (i.e. unrequested) hearings on other licensing actions such as license amendments;
>
> Sentence Three – provided that in the case where a hearing had not been requested such other licensing actions could be taken only after 30 days' prior notice and publication in the Federal Register;
>
> Sentence Four – excepted from this 30 days' prior notice and publication requirement those license amendments which the NRC finds to involve no significant hazards consideration.

Petitioners in this case attempt to read into Sentence Four language that Congress did not choose to write and even petitioners admit "189(a) does not expressly mention." U.S. Brief 14. Petitioners argue that Sentence Four might somehow be read to authorize the denial of a requested hearing. But the arguments offered for this im-

aginative reading of § 189 lack cogency, boiling down essentially to the non-sequitur assertion that to authorize waiver of notice and publication when a hearing has not been requested necessarily implies authority to deny a hearing when one has been requested. This ignores the fact that economy of prose if nothing else would lead a legislative draftsman intent on authorizing the denial of a requested hearing to simply say as much and thereby make any reference to notice and publication unnecessary. The ambiguity petitioners seek in § 189 as the essential foundation for their case is simply not to be found there.

Petitioners also fail to present a single example of legislative history or relevant administrative practice that is in any way inconsistent with the principle that a meaningful hearing must be held on request made at some time after the initial decision is issued on a "no significant hazards consideration" license amendment. Nor do petitioners cite any legislative history or administrative practice whatsoever even bearing on the principle embodied in the Court of Appeals' holding in this case that to be meaningful a hearing on an amendment involving irreversible action such as release of radiation into the environment must be held *prior* to final issuance and effectuation of the license amendment.

Petitioners seek to supplement a statutory construction argument riddled with empty reasoning, confusion and irrelevance by offering wholy disingenuous predictions about the dire consequences that the relatively infrequently invoked due process rights involved in this proceeding might speculatively have upon NRC administrative efficiency. The speculation that props up this policy argument is readily revealed to be as unreliable as petitioners' idiosyncratic approach to statutory construction.

The due process rights at stake – infrequently invoked as they may be – are nevertheless too important in the context of protection of the public against hazards of radiation to be so lightly revoked as by the judicial legislation sought by petitioners in this case. The unique and vast discretion already reposed in the NRC over matters that hazard grievous loss of life, liberty and property precludes the judicial erosion of the minimal due process rights accorded by a strict and faithful construction of the plain language of the statute by which Congress sought to structure otherwise unbounded agency discretion with procedural safeguards.

ARGUMENT

The resolution of this case will turn on the interpretation given by the Court to the fourth sentence of § 189 of the Atomic Energy Act. The fourth sentence of § 189 refers back to and can only be understood in reference to the third sentence of § 189 which provides that *in the absense of a request* for a hearing on certain licensing actions, a hearing may be omitted prior to issuance of the amendment, but only after a 30 days' notice and publication of the NRC's intent to so proceed without such an (unrequested) hearing. The fourth sentence goes on to provide that "such 30 days' notice and publication" may be dispensed with, in the case of amendments, "upon a determination by the Commission that the amendment involves no significant hazards consideration." It is this language which petitioners seek to turn into authority for denying *requested* hearings upon a finding of "no significant hazards consideration." Such authority would provide a powerful weapon in the hands of an agency seeking to conduct its affairs outside of public view. Strategic use of this weapon can effectively paralyze representatives of the public who would seek to contest controversial issues involving

nuclear safety by requiring them to litigate first in the Court of Appeals an ultimate question of fact on a barren record. Because of problems of timing, because a "court more often than not will decline to grant emergency relief," 651 F.2d 784 note 14, and because of the sheer expense of litigation for public interest plaintiffs who stand to make no financial gain from the litigation, even a victory in Court will typically be Pyrrhic – as it was in this case.

In order to craft such a weapon from the otherwise innocuous language of § 189 petitioners must of necessity prevail in persuading this Court, as it failed to persuade the Court of Appeals, of the following:

> 1. That the fourth sentence of § 189 contains some ambiguity which might allow an interpretation that the NRC has authority to deny a requested hearing on the basis of a "no significant hazards consideration" finding, and
>
> 2. Legislative history exists that indicates that Congress intended § 189 to authorize the NRC to deny a requested hearing on the basis of a "no significant hazards consideration" finding, or
>
> 3. Consistent administrative practice interpreted § 189 to permit the NRC to deny a requested hearing on the basis of a "no significant hazards consideration" finding.

In addition petitioners attempt to fashion a "public policy" argument in support of granting the NRC the authority it seeks to deny duly requested hearings.

The arguments offered by the petitioners in their briefs on these issues constitute an unbroken tissue of disingenuous assertion, speculation and non-sequitur. Each of these arguments is answered in turn below.

1. The Plain Meaning of § 189 Forbids Any Interpretation That a Duly Requested Hearing May Be Denied Upon a Summary Finding by the NRC That a License Amendment Involves No Significant Hazards Consideration.

In its brief presented to the Court of Appeals the United States gave a cogent exegesis of the plain meaning of § 189 (Justice Department Brief pp. 4-8, 12-4). In its brief before this Court the United States attempts to turn the tables to assert that the "plain language" of the statute supports the NRC's position. (U.S. Brief 38). The petitioners' "plain language" arguments are as weak here as the United States' arguments were strong below.

a) The principal argument relied upon by Met Ed and the NRC below was that since a right to hearing is not meaningful without an attendant right to notice, Congress' authority to waive notice must have carried with it an implicit waiver of the right to hearing. However, as the Court of Appeals found, this seeming "paradox" is theoretical only, it did not occur in this case, and it is unclear whether it would ever occur. First the notice required under 10 CFR 2.106 probably must be given before an issued amendment is effectuated so as to provide an opportunity for appeal. Second, and more important the Government in the Sunshine Act, 5 U.S.C. 552b (1976) provides that every meeting at which the Commissioners dispose of agency business must be open to public observation. Accordingly the interested public and the press have ample means to learn of decisions that might affect their interests. Even the repealed 10 CFR 50.59 so heavily relied upon by petitioners, in subsection(g) (J.A. 25-26) required that both the request for a license change and the authorization issued by the Commission must be made

part of the public record of the licensing proceeding. Again any persons following the proceedings would have actual notice of the licensing action.

Both briefs of petitioners cite the case of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) for the proposition that a right of hearing without notice is meaningless. U.S. Brief 38; Met Ed Brief 24 note 18. But both briefs ignore the type of notice that is being waived under § 189, i.e. publication in the Federal Register. The significance of such notice was tellingly described, on the very next page of text in Mullane from that cited by petitioners, as follows.

> It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts . . . [Compared to] actual notice we are unable to regard this as more than a feint . . . . Chance alone brings to the attention . . . an advertisement in . . . a newspaper. Id. 315 (sentence order modified).

Persons having the economic and scientific resources required for participation in a hearing on a license amendment would not likely find out about the amendment by casual perusal of the Federal Register. It is far more likely that they would be monitoring the proceedings by which they are affected and learn about the amendment directly or indirectly from the public record. The purpose and effect of sentence four is to save 30 days of administrative time on each of the overwhelming number of amendments where it can be reasonably expected that no hearing will be requested, i.e. whereof the NRC fairly determines there to be "no significant hazards consideration." Given petitioners' estimate of about 400 "no significant hazards con-

sideration" amendments a year, this technique saves about 12,000 days of administrative time annually. The due process cost of so expediting the overall administrative licensing process is that any affected party seeking a hearing on an irreversible action has the burden of requesting a hearing promptly before the issued amendment is given effect.

The compromise struck by the fourth sentence of § 189 between administrative efficiency and administrative due process has apparently been an eminently workable one. In the 19 years since this provision was enacted only one other dispute involving the provision has reached the courts, *Brooks* v. *AEC,* 476 F.2d 924 (1973). Both in *Brooks* and in the instant case the cause of the dispute over the fourth sentence of § 189 was generated less by any ambiguity in the provision itself than by the NRC's attempt to cover more serious violations of other provisions of § 189 that were coupled with the NRC's violation of this provision.

b) The other argument offered by petitioners in hopes of reading some ambiguity into § 189 is based on a non-sequitur. The government's brief at 36, the last two sentences, states correctly that the words "such thirty days' notice and publication" in the fourth sentence refers back to the notice and publication required when the NRC intends to issue a license amendment without a hearing. This action is of course by the very terms of sentence three only permitted "in the absence of a request" for a hearing. However, petitioners conclude, in what must be a minor classic of illogic, that if the NRC is allowed, upon making a no significant hazards consideration finding, to dispense with the notice required when a hearing has been omitted because one has not been requested, "it necessarily follows that the Commission is in fact entitled to dispense with a

hearing". Ibid. The simple answer to this notion is that sentence three provides that a hearing may indeed be dispensed with when one has not been requested. Sentence four says nothing about and does not remotely suggest the possibility of dispensing with a hearing *that has been requested.* Its use of the words "such notice" makes it clear that sentence four is only a qualification of, and is therefore limited to the subject matter of, sentence three.

Petitioners attempt to explain away this obvious relationship between sentences three and four of § 189 in a string of non-sequiturs. U.S. Brief 36 note 30. First petitioners state that respondents' recognition of this relationship somehow conflicts with the interpretation of the Court of Appeals. But petitioners do not explain how they came to believe the Court of Appeals' view differed from that of the respondents. Several references are provided (id. 37 & note 31) suggesting that the Court of Appeals assumed the "sentence three" notice of NRC intent to issue a license amendment without a hearing would also be the first notice that a license amendment would issue at all. This identity between the two possible kinds of notice not only exists in fact, since the law nowhere requires any other published notice of the action prior to the notice required by sentence three, but it is also the very premise upon which petitioners argument discussed in 1(a) above is based. If some notice other than that required in sentence three were to be given by the NRC of the issusance of a license amendment, then there would be no basis whatsoever for the argument that waiver of "sentence three" notice implies waiver of hearing. However, in the argument of petitioners now under discussion a wholly disingenuous attempt is made to discover some error of indeterminate consequence in the Court of Appeals' decision by suggesting that the notice of action without a hearing is

somehow distinct from the notice of the action, without anywhere stating that there is any practical difference between the two. This attempt can only be understood as an effort to import the confusion and ambiguities of petitioners' own arguments into the statute.

Next (id. 37 note 30) petitioners seek to base a similarly confused argument on the use of the word "any" in the sentence four phrase that the "Commission may dispense with such thirty day notice and publication with respect to any application for an amendment . . ." It requires no elaborate argument to show that the word "any", just as the whole sentence, is qualified by the words "such notice" which in turn refer back to the waiver of hearing when one is not requested *per* sentence three. So again an attempt to find ambiguity through analysis of the words of the statute leads nowhere.

Next petitioners state that "respondents' suggestion fails to account for" the omission of the issuance of an operating license from the coverage of sentence four. (Id note 30.) The simple answer to this argument is that the omission accounts for itself. It is only too obvious that an operating license could never under any circumstances "involve no significant hazards consideration" and therefore there is no need to include operating licenses within the scope of sentence four.

Finally petitioners close out this pointless string of arguments on the plain meaning by repeating the ever-ready assertion that the legislative history of § 189 "adopts the Commission's practice under 10 CFR 50.59." Id. This assertion is irrelevant to a discussion of the plain meaning of § 189 and is dealt with below. Legislative history — even if it did support petitioners' interpretation, as 10 CFR 50.59 fails to do — could not create ambiguity in the text

of the statute. This exhausts the arguments proffered by petitioners to undermine the clear and plain meaning of sentence four. In their lack of persuasiveness, and even logic, these frivolous arguments only serve to reinforce the plain meaning which a simple reading of sentence four unambiguously conveys, i.e. that sentence four of § 189 pertains to notice and publication and has nothing remotely to do with authorizing the denial of a duly requested hearing on a license amendment.

2. The Legislative History of § 189 Lends No Support to the Notion That Congress Intended to Authorize the NRC to Deny a Duly Requested Hearing on the Basis of a "No Significant Hazards Consideration" Finding.

Petitioners devote the greatest portion of their argument to a discussion of legislative history. U.S. Brief 15-35. Although many fragments from the legislative record are quoted and discussed nothing is found to modify the conclusion of an exhaustive discussion of the legislative history of § 189, set forth in the brief of the United States before the Court of Appeals, explaining the view that § 189 does not authorize the NRC to deny a duly requested hearing:

> The legislative history of the 1962 amendment is the most compelling reason for our holding this view. Throughout the legislative history, at crucial points, are authoritative statements that the effect of the amendment would be only to eliminate hearings when none was requested. It was repeatedly said that the amendment would not affect the right of any person to obtain a hearing on request. Memorandum of Respondent United States of America 14;

In fact, as admitted by petitioners, the legislative history on sentence four of § 189 is sparse. U.S. Brief 34. Most of the discussion of legislative history presented by petitioners is simply padding in no way inconsistent with the conclusion of the United States quoted immediately above. Once this padding is pared away petitioners case is seen to depend upon the following simple, though untenable, chain of argument:

> a) The Committee Report statement that the "significant hazards consideration . . . criterion is presently being applied by the Commission under the terms of AEC Regulation 50.59" is asserted by petitioners to "incorporate by reference" all of 50.59, U.S. Brief 32, 34, rather than at best simply adopt the administrative interpretation of the "significant hazards consideration" criterion apparently borrowed by Congress from 50.59.
>
> b) Regulation 50.59 and the *Vollecitos* decision which it codified is asserted to stand for the proposition that a duly requested hearing can be denied by the NRC on a license amendment found by the NRC to involve no "significant hazards consideration."

Proposition (a) above requires little discussion to refute the wildly expansive claim made by petitioners for what is rather modest language. There is simply no indication anywhere in the legislative history that Congress intended to adopt all of 10 CFR 50.59 (1963) by reference when it mentioned that the "significant hazards consideration" criterion adopted by Congress in sentence four of § 189 is also applied by the NRC under 50.59. The purpose of Congress in including this brief allusion to 50.59 is clear

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result of the fourth sentence of § 189 this would mean that affected persons would, theoretically, not necessarily have prior notice of the authorization of the changes permitted under the 50.59 provisions, while the right to a requested hearing would remain unchanged. In practice however it was clear that the *Vallecitos* approach, codified in 50.59, provided both notice and opportunity for hearing. The best evidence of the NRC's practice under the *Vallecitos* decision are actions taken with respect to license amendments in the *Vallecitos* proceeding itself subsequent to the November 18, 1960 decision later codified as 50.59. For example, a September 1, 1961 license Amendment No. 17 to the Vallecitos license DPR-1 stated that,

> prior public notice of proposed issuance of this amendment is not necessary in the public interest since [it] would not present any substantial change in the hazards to the health and safety of the public . . . .
>
> In accordance with the Commission's rules of practice (10 CFR Part 2) the Commission will direct the holding of a formal hearing on the matter of issuance of the license amendment upon receipt of a request therefor from the licensee or an intervenor within 30 days after the issuance of the amendment. 26 Fed. Reg. 8469.

This administrative practice makes clear that the NRC accorded a hearing upon request after *Vallecitos* on the kinds of issues that presented no significant hazards consideration. That Congress did not "incorporate by reference" § 50.59 in its statutory scheme did not therefore mean that Congress disapproved the Commission's practices — the straw man that petitioners would set up. See U.S. Brief 34 note 27. Congress simply achieved a similar

result in a different manner. Once sentence three did away altogether with mandatory hearings past the construction permit stage, 50.59 no longer had the same pertinence to NRC proceedings that it had before the 1962 amendments and the portions relevant to this proceeding were eventually repealed.

Finally, the notion that "the court of appeals' interpretation of the legislative history . . . fails to ascribe any independent purpose or effect to the fourth sentence" of § 189 is simply absurd. See U.S. Brief 33. The Court of Appeals gave to the fourth sentence precisely the effect its words and Congress intended, i.e. to permit the NRC to waive notice and publication of amendments found to involve no significant hazards consideration. If Congress had intended to permit the NRC to deny a requested hearing as well as waive notice and publication it could easily have found the words to do so.

3. The NRC's Own Administrative Practice Does Not Support Its Denial of a Requested Hearing Prior to Taking an Irreversible Act Pursuant to a License Amendment Found By the NRC to Involve "No Significant Hazards Consideration."

Petitioners raise the issue that the "court of appeals erroneously failed to defer to the Commission's longstanding interpretation of Section 189(a)." U.S. Brief 39. However the administrative practice offered in support of this proposition simply will not bear the weight assigned to it. Petitioners rely again principally upon the *Vallecitos* decision and its codification in 50.59 which as shown above both addressed the problem of mandatory, unrequested hearings and did not at all suggest that the NRC had authority to deny requested hearings. Met Ed Brief

27. At the time of this administrative practice the only problem the NRC had encountered concerning its single contested proceeding was the NRC's own failure to provide adequate notice and hearing which, as Intervenors noted, subjected the agency to considerable attack in Congress. Met Ed Brief 13.

Aside from these two over-used props to petitioners' case, both of which actually predated the enactment of sentence four and accordingly could be of no use in discovering administrative practice under that statute, petitioners offer very little that can be considered even relevant to the interpretation of sentence four.

Intevenors cite one lonely example of pure *dicta* from an Atomic Safety and Licensing Board decision which supports the petitioners' interpretation in this case. Met Ed Brief 29-30. But this decision is simply not the practice of the Commission itself which might be deferred to by a court. Atomic Safety and Licensing Board members are selected from outside the agency and do not include members of the Commission. Cf. 10 CFR 1.11 & 2.721. They do not form a permanent administrative organ creating a body of precedent out of a coherent fund of experience, but rather are selected from a panel to sit as *ad hoc* boards constituted for particular licensing hearings. The boards are not involved in administering the statute but rather take evidence and issue decisions on technical matters. One statement, which was in fact *dicta,* from one of these part time *ad hoc* boards in 1974 is not the kind of administrative practice that might justify the NRC's unprecedented denial of a requested hearing in this case.

From the Commission itself petitioners can only offer the bare statement that "Section 189 does permit immediate effectiveness" of amendments found to involve

"no significant hazards consideration." Met Ed Brief 29. Of course this statement says no more than that prior notice may be waived when issuing an amendment pursuant to the fourth sentence of § 189. Intervenor goes on to claim that "the Commission has consistently applied its interpretation of the Act thousands of times . . . to make license amendments effective immediately without notice or opportunity for a prior hearing." Ibid. The sense in which this statement is partially true lends no support to petitioners' attempt to overturn the decision of the Court of Appeals. There is no dispute that the NRC has authority to make "license amendments effective immediately without notice." Similarly the proposition that a prior hearing may also be omitted can be made literally true if "prior" means only prior to the authorization that may be issued without notice and does not refer to the case where a hearing may have been requested. Taken in any other sense this assertion is simply untrue. Petitioners have been unable to provide any single instance before Three Mile Island where the Commission denied a hearing that had been duly requested or where request for a hearing on an irreversible action did not suspend the effectiveness of the amendment. This would be the only kind of administrative practice relevant to this case, and it simply does not exist.

Because the petitioners offer, as examples of administrative practice supportive of their attempt to overturn the Court of Appeals' decision, matters that are wholly irrelevant to the issues at stake in this case it is important, finally, to set forth very clearly just what are the areas of difference between petitioners and respondents.

Respondents clearly do not contend that where no hearing has been requested prior to the authorization of a "no significant hazards consideration" license amendment the NRC must hold a hearing prior to the authorization. But

this nevertheless apparently forms the straw man at which much of petitioners' argument is misdirected. Respondents simply contend, first, that in every case where an affected party duly requests a hearing on a license amendment a hearing cannot be denied on the grounds of a "no significant hazards consideration" finding. Numerous references to the right to some hearing in the petitioners' briefs suggests that the petitioners do not disagree with this proposition. See U.S. Brief pp. 21, 35 notes 28 ("opportunity to intervene does not necessarily require a hearing prior to initial action by the Commission") and 29 (§ 189 fourth sentence "does not necessarily require that a hearing be held prior to action by the Commission") Met Ed Brief 16 line 4, 17 line 13, 21 lines 5-6, 25 note 21 lines 3-5. Both briefs point out that the NRC's practice is that it "remains willing to entertain requests for a hearing filed after" it issues a license amendment. U.S. Brief 40 and note 33; Met Ed Brief 29. In fact the NRC followed its practice of offering some hearing in this very case.The problem in this case is that the offer of hearing was totally meaningless because it involved actions that were irreversible and the NRC made the novel ruling that a request for a hearing would not stay the effectiveness of the amendment. Pet. 66a. There is nothing in any legislative history even suggested by petitioners or any administrative practice of any kind prior to 1980 which would authorize the NRC to issue such a ruling under any circumstances, much less where the action authorized is irreversible.

Respondents herein have recognized from the beginning that where a "no significant hazards consideration" finding is made the basis for waiving notice, and no prior request has been made for a hearing, it will not be necesary under § 189 for the NRC to hold a hearing prior to "initial action approving the amendment" by the NRC. Respondents have insisted only that a hearing on an ir-

reversible action be held on request prior to the final issuance of the amendment (after any stay) and prior to the licensee's taking any irreversible action pursuant to the amendment. Therefore it appears that the "Argument" of petitioners stated at pp. iii & 15 of the United States' Brief is in no way inconsistent with the respondents' position consistently held in the Court of Appeals and before this Court and can be easily reconciled with the Court of Appeals' holding on the facts of this case. The hearing required to be held upon request by § 189 in the case of a "no significant hazards consideration" finding may be held "after initial action approving the amendment" provided it is held prior to final issuance and effectuation of the amendment. In the case presently before this Court the NRC contemplated a hearing only after the full and irreversible effectuation of the admendment by release of radioactive materials into the environment. Such a hearing would have been nothing other than meaningless.

Petitioners attempt to explain away the absurdity of holding a hearing on an action irreversibly taken, as the NRC proposed to do in this case, with the not quite relevant observation that the "vast majority of operating license amendments are reversible." Met Ed Brief 34. While it may very well be true that "[a]mendments determined to entail no significant hazards considerations are not generally irreversible, thereby making meaningful the opportunity to seek an after-the-fact hearing and judicial review," U.S. Brief 40 note 34, it is just as clear that for those albeit few cases where the action authorized by an amendment will be irreversible a hearing after effectuation of the amendment will be meaningless. This case is not one of the "vast majority" but rather involves, as conceded by petitioners (Met Ed Brief 34), an action that was irreversible. Accordingly the interesting question of whether or not a hearing on an amendment authorizing an action that is

not irreversible may be held after effectuation of the amendment is not presently before the Court on the facts of this case. The only question is whether a hearing granted after effectuation of an admittedly irreversible action is a meaningful hearing, assuming – as it appears – that petitioners concede some hearing to be required by § 189. As the Court of Appeals simply held, "§ 189(a) required a hearing upon request on the Venting Order before it went into effect; a hearing after the venting had been completed would not have satisfied the statute's requirement." 651 F.2d 791 note 28. See also *Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972)

4. This Court's Upholding of the Plain Meaning of § 189 So As To Accord Requested Hearings on "No Significant Hazards Consideration" Amendments Involving Irreversible Action Will Not Introduce The Overwhelming Administrative Burdens Imagined By Petitioners

Petitioners attempt to fashion a public policy argument that if § 189 is interpreted as the Court of Appeals did interpret it below to require a hearing when requested on a "no significant hazards consideration" amendment, there will as a result occur such a flood of hearing requests as to "threaten the viability of the existing system of regulation." U.S. Brief 41. With all respect, this argument is patent nonsense. Petitioners mention no requests for hearings on "no significant hazards consideration amendments" since the November 19, 1980 decision in this case. Petitioners fail to cite one instance other than this case where intervenors have ever requested a hearing on a "no significant hazards consideration" amendment, except for the *Consumers Power Co.* case where the Atomic Safety and Licensing Board found that the hazards considerations could be significant and granted a hearing, 7 AEC 297,

298 (1974). Met Ed Brief 29-30. The Court of Appeals ruling in this case has in fact been the law of the District of Columbia Circuit since the *Brooks* decision in 1973 without stirring a flood of hearing requests. Since petitioners seemingly concede that some hearing is required, just not a *prior* hearing, the grant of a meaningfully timely hearing will not require more resources but simply better planning. Finally, this case only deals with amendments involving irreversible action. Petitioners themselves concede that such amendments are relatively rare. This concession considerably deflates their assertions about the vast consequences of the decision in this case. Petitioners' argument about the dire consequences of the Court of Appeals decision simply does not hold up against actual experience or petitioners' own statements about the rarity of irreversible amendments.

Not only do the circumstances of this case – a request for a hearing on a "no significant hazards consideration" amendment which is irreversible – seldom arise, but numerous techniques exist for expediting the NRC proceedings which are in no way compromised by the Court of Appeals' decision. In any situation where the "public health, safety or interest so requires," the NRC is permitted by regulation to make a license modification effective immediately. See 10 CFR § 2.204. The NRC enforces a rigorous standing requirement for intervenors. 10 CFR § 2.714.

Hearing examiners have authority to dispose of issues on the pleadings where there is no genuine issue as to any material fact, 10 CFR § 2.749 and may otherwise expedite proceedings, e.g. 10 CFR §§ 2.757, 2.761.

The most telling reason why the fears proffered by the NRC may be substantially discounted was well stated by

then Circuit Judge Burger in the context of standing before the FCC. The following sage observation of Chief Justice Burger is equally applicable to the petitioners' "parade of fantasized horrors" in this case:

> The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the costs burdensome. Moreover, the listening public seeking intervention in a license renewal proceeding cannot attract lawyers to represent their cause by the prospect of lucrative contingent fees, as can be done, for example, in rate cases. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966)

Petitioners' "man bites dog" report that such intervenors are going to "threaten the viability of the existing system of regulation of nuclear power production, power production itself, or both," U.S. Brief 41, strains credulity.

5. The Important Interests of Due Process and Fundamental Fairness Require That § 189 Be Strictly and Faithfully Construed to Preserve the Public's Right to a Hearing Before Suffering the Irreversible Effects of Radiation, In the Absence of Clear and Unmistakable Evidence of Congressional Intent To Deny That Right.

The public has a profound interest in NRC licensing actions. In the course of deliberation on the Atomic Energy Act, Senator Humphrey stated:

> I think it is fair to say that no single development in the nation is more public in nature than the atomic development, for it has been paid for by all the taxpayers. 100 Cong. Rec. 10730 (1954).

Because of the continuing symbiotic relationship between government and the nuclear industry (see findings of fact in *Oklahoma* v. *Bernstein,* 5 Media L. Rep. 2313 (1980)) government has more direct responsibility for injuries suffered by the public in the context of nuclear regulation than would be the case in other regulatory contexts.

Because of the peculiar nature of radiation, prior regulation to prevent releases of radiation is the chief remedy available to those subjected to its hazards. The NRC has been given vast discretion to balance risks and benefits in this area, and the procedural rights granted the public constitute the chief means by which Congress has structured the discretion it has delegated to the NRC. Although the procedural rights at stake in this case have been accorded by statute, they are of a kind traditionally considered fundamental and have been accorded a high degree of protection by this Court.

i) The hearing right denied by the NRC was essential to elemental fairness and due process for those affected by the radiation releases.

The Fifth Amendment of the United States Constitution prohibits the Federal government from depriving any person of life, liberty or property without due process of law. The intentional release of radioactive materials into the earth's atmosphere, whether from the containment building of the partially melted-down Three Mile Island reactor or from any operating power reactor, adversely affects human life, burdening the public with debilitating disease and afflicting the genetic heritage of humanity with irreversible mutations and chromosomal aberrations. The assault of radiation on the human cell is a submicroscopic event, its consequences, though serious, are remote in time and attributable to diverse possible etiologies. Accordingly, the precise causal relationship between known quantities of radioactive materials dispersed into the environment and any particular human pathology is virtually unprovable, though epidemiological, biostatistical, and public health studies are showing that the generalized effects of low level radiation are seriously underestimated by the radiological theories of the NRC.

Though the injury inflicted upon life, liberty and property interests by releases of radioactive materials into the petitioners' environment may not be easily identified to particular individuals, there is no uncertainty that life in human cells will be damaged by this radiation,[2] the liberty

[2]"[I]t is generally believed that any exposure to radiation, however small, has adverse genetic effects and those effects are cumulative." Green, Safety Determination in Nuclear Power Licensing: A Critical View," 43 Notre Dame Lawyer 633, 645 (1968).

to be free of disease may well be infringed, and nearby property values may decline as animals die and suffer injury. Meanwhile, those who evacuated their homes to avoid possible injuries are deprived of their liberty of movement and peace of mind. As the Supreme Court ruled in *Duke Power* in light of the uncertainties about its health and genetic effects, the emission of radiation itself is a cognizable present injury to these interests. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978). The nature of the interests involved here, especially protection from physical assault by radiation, are profound. There are few Due Process cases that involve tort-like interferences with life and liberty interests in the physical integrity of the person because,

> prior hearings might well be dispensed with in many circumstances in which the State's conduct, if not adequately justified, would constitute a common-law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff . . . . Monaghan, "Of 'Liberty' and 'Property,'" 62 Cornell L.R. 405, 431 (1977).

However, the nature of low level radiation injuries, the long latency period and problems of proving causation all but preclude tort recovery outside the workplace, except in such an exceptional factual circumstance as was present in *Silkwood* v. *Kerr-McGee Corp.*, 585 F.Supp. 566 (W.D. Okla. 1979), virtually the sole tort recovery for radiation injury (autopsy conducted shortly after plutonium facility worker's substantial off-site contamination, which was discovered by monitors at workplace).

For infliction of physical injury by radiation, the only effective way to accord a potential radiation victim due

process is to provide access to a hearing before the injury is inflicted. In § 189 Congress has struck a delicate balance between due process and administrative efficiency that has survived unchanged since 1962 through the most active period of reactor licensing of the 1960's and 1970's. The basic procedural rights accorded by Congress cannot be eroded by administrative interpretation without raising issues of constitutional import. This Court has stated:

> The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm.* v. *McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965).

Mathews v. *Eldridge,* 424 U.S. 319, 333 (1976).

In *Greene* v. *McElroy,* 360 U.S. 474, 507-08 (1959) the Court held:

> Where administrative action has raised serious constitutional problems, the Court has assumed that Congress . . . intended to afford those affected by the action the traditional safeguards of due process. (citations omitted) These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, *even in areas where it is possible that the Constitution presents no inhibition.* (emphasis added)

While injuries from non-natural low level radiation may be a novel twentieth century phenomenon, the procedural rights at stake in these cases are as ancient as the traditions of a free people. "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States,* 318 U.S. 332, 347, (1943) (Frankfurter, J.). In a government of laws the Nuclear Regulatory Commission must also be made subject to the fundamental and minimal procedural safeguards accorded by Congress to protect our traditional liberties. Not to do this much in an area frought with political controversy is to countenance and encourage the divisiveness, alienation and stress that happens

> . . . when a substantial number of people come to believe that major decisions have been made without their consent. If the social fabric is to survive, the politics of manipulation and delegation simply must be replaced by a politics of informed consent. Wright, "Beyond Discretionary Justice," 81 Yale L.J. 575, 586 (1972)

The fallout of psychological stress and alienation which resulted from the NRC's handling of the situation underlying this case is part of the record. In hearings on the cleanup, Senator Simpson, Chairman of the Senate Nuclear Regulation Subcommittee, noted, after hearing "residents of the local population around Three Mile Island," that it was reported the NRC "approach was driving them batty." J.A. 71. Senator Simpson sensed "a community which is already anxious as a result of the accident and highly skeptical of the two organizations directly involved in the cleanup; that is, the NRC and the utility. Given this situation, it seems to me prudent if not essential for the NRC to lay out in detail for full public review the standards it expects the utility to meet and the means it will

use to ensure the compliance." J.A. 72. The need for the NRC to provide a formal means of participation in decision making about the TMI-2 cleanup was made clear by two psycholologists. Dr. Bruce Dohrenwend, Head, Social Psychiatry Research Unit, Columbia University pointed out to the NRC prior to the venting the "local citizens needs to be informed and to participate in the decisions on atmospheric decontamination. He emphasized the relationship between information and participation and the level of psychological stress within the population." J.A. 90. Dr. Colman informed the NRC, after a sham "public meeting" where the public had no apparent means for influencing decision making but was rather designed to "sell" the public a decision already made:

> As a Psychologist I am getting scared. Those Meetings are rowdy . . . . I think unless some mechanism can be developed so the people in that area have a realistic understanding that they are gaining control over the situation there by having a clear effect on the Commission about its decision, that anger level is going to keep on going. Wherever it goes, I don't want to speculate, but it is not healthy, it is not good.

These behavioral scientists are expressing in the language of their own disciplines what is perhaps the fundamental constitutive principle of our democratic polity. As a leading Constitutional law scholar has expressed it in discussing the due process right to a prior hearing,

> rights to interchange express the elementary idea that to be a *person* rather than a *thing* is at least to be *consulted* about what is to be done with one. L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) 503.

ii) The public has virtually no practical recourse for protection against injurious releases of radiation upon them other than a prior NRC hearing.

The Atomic Energy Act, as amended, has placed vast powers in the hands of the five person Nuclear Regulatory Commission, an independent agency whose members are appointed to five year terms by the President with the advice and consent of the Senate, 42 U.S.C. 5841(b) and (c). The Atomic Energy Act grants the NRC broad rule-making and adjudicatory powers under "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives", *Siegel* v. *AEC,* 400 F.2d 778, 783 (D.C. Cir. 1970)

The power granted the NRC under the Atomic Energy Act in the area of protection against radiation hazards wholly preempts the police powers of state and local governments, 42 U.S.C. 2021(k); *Northern States Power Co.* v. *Minnesota,* 447 F.2d 1143 (8th Cir. 1971) *aff'd mem.* 405 U.S. 1035 (1972). Therefore, the public must turn to the Federal government, and, within the Federal government, to the NRC as virtually its sole source of regulatory protection against radiation hazards. Cf. *Train* v. *Colorado PIRG,* 426 U.S. 1, (1976); 42 U.S.C. 6903 (27) (1976); with 40 CFR 190.10 and 42 U.S.C. 7602(g) (Supp II, 1978).

The NRC is empowered by the "Price-Anderson Act", 42 U.S.C. 2210(e) (1976) to confer a limitation of liability on its licensees for any damages in excess of $560 million, a small fraction of the damage that could result from a nuclear accident. See *Duke Power* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59, (1978). For

the more insidious and less dramatic forms of radiation injuries caused by low level radiation, problems of proof, e.g. *Mahoney* v. *United States,* 220 F.Supp. 823 (E.D. Tenn.) *aff'd* 339 F.2d 605 (6th Cir., 1964), and statutes of limitations make any hope of receiving compensation for injuries by damage suits at law highly speculative. The public is accordingly not only reliant entirely upon the NRC for its regulatory protection against radiation hazards, but it is also largely dependent upon prior regulation of hazards, as opposed to *post hoc* legal remedies for damages, as a form of protection.

Notwithstanding such a scheme which combines in a single agency vast responsibility for the welfare of the public with a unique degree of untrammeled discretion, it is nevertheless true that the remedies which the public has been given in order to keep the NRC responsible have been narrow and few. Unlike statutes such as the Clean Air Act or the Safe Drinking Water Act which permit citizens' suits, see *Susquehanna Valley Alliance* v. *Three Mile Island,* 619 F.2d 231, 242 note 12 (3rd Cir. 1980), the Atomic Energy Act does not create any general public right for enforcement of environmental standards against users of radioactive material, id. 237-39. Licensees of the NRC are entirely shielded by the Agency from any direct citizens' actions in the courts under the Atomic Energy Act. Preemption prevents the state from creating any other rights enforceable in state courts. *Pacific Legal Foundation* v. *State Energy Resources Cons. & Dev. Com.,* 472 F.Supp. 191 (S.D. Cal. 1971). To protect themselves from radiation hazards created by users of radioactive materials, the public must rely upon the NRC licensing and enforcement process. It is only in the narrow framework of the NRC's administrative proceedings that the public is granted a forum within which it may attempt

to protect its interest in health and safety. Within this context the public must conform to the rules and regulations set by the Nuclear Regulatory Commission, and may appeal the final findings and rulings of the Commission only to a Court of Appeals where those findings, rulings and interpretations are accorded favorable presumptions of accuracy, reasonability, and respect, and the scope of review and opportunity for fact-finding is narrow. See e.g. *Nader* v. *NRC,* 513 F.2d 1045, 1055-56 (D.C. Cir. 1975). The rights accorded the public by Congress in its broad delegation of power to the NRC are exceedingly narrow,encompassing only the minimal due process rights of notice, public adjudicatory hearing and participation contained in § 189. Short of electing a sympathetic president who might gradually replace the NRC Commissioners or electing a sympathetic Congress which might change the whole statutory scheme for nuclear regulation, the only remedy and protection which might be pursued by citizens, such as the petitioners, residents in the vicinity of TMI-2, who find themselves victim to the radiation hazards created by an NRC licensee, is exercise of these narrow due process rights accorded by § 189.

The authority under which the NRC exercises its discretion to determine radiation hazards and to permit degradation of the environment as a cost of producing energy, is essentially similar to the legislative provisions which Justice Rehnquist would find to

> violate the doctrine against uncanalized delegations of legislative power

in *Industrial Union Department* v. *American Petroleum Institute,* 448 U.S. 607, 672, 675 (1980).

Where standards are as loose as those provided by the Atomic Energy Act it is even more essential that all of the procedural safeguards required by Congress be strictly enforced in agency decisionmaking. *See* K. DAVIS, I ADMINISTRATIVE LAW TREATISE, Section 3.15(b) (1978) pp. 209-11. In the present case the NRC is attempting to expand its discretion so as to weaken the most fundamental of due process safeguards which were provided by Congress as a guide to agency decision making in an area of inherent uncertainty. In lieu of providing firm standards to guide the substantive decisionmaking of the NRC, Congress at least structured agency procedure so as to assure that the NRC would take into account all available information by according the public the procedural rights of notice and hearing and participation. In light of the information presented in formal adjudicatory hearings Congress expected the NRC to develop its own precedents, standards and rules. However, in this case the NRC took its very first decision in the uncharted area of a reactor accident cleanup without according those procedural rights Congress erected to assure that decisions would be well-informed and based on all available information. While those rights cannot be restored, they may be vindicated by affirming the declaratory judgment entered by the Court of Appeals below.

CONCLUSION

There is no support in the plain meaning of § 189 of the Atomic Energy Act, in its legislative history, in administrative practice under the provision, in case precedent, or in reason for the NRC's contention that it can deny, on the basis of a "no significant hazards consideration" finding, the right of an affected person to have a duly requested hearing prior to final issuance and effectuation of a license amendment.

The judgment of the Circuit Court of Appeals for the District of Columbia, below, should be affirmed.

Respectfully submitted,

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